No. 19,967

In the

United States Court of Appeals

For the Ninth Circuit

BANKERS LIFE AND CASUALTY COMPANY,
a corporation,
Appellant,

vs.

ARIZONA PUBLIC SERVICE COMPANY,
a corporation,
Appellee.

Petition for Rehearing

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TABLE OF CASES AND AUTHORITIES

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To the Honorable
Charles M. Merrill, *Circuit Judge*
M. Oliver Koelsch, *Circuit Judge,* and
James R. Browning, *Circuit Judge*

Appellant, BANKERS LIFE AND CASUALTY COMPANY, hereby petitions for a rehearing to consider the judgment entered in this action on August 15, 1966, on the following grounds:

1. This is simply not a case where estoppel or waiver are available to force appellant to pay a claim caused by an excluded risk. The general and majority rule is that neither estoppel nor waiver is available to an insured, to bring within the coverage of an insurance policy, risks that are not covered or that are specifically excluded. The rationale for the rule is that to apply these doctrines to an excluded risk would be to make a new con-

tract for the parties and to force the insurer to protect against a risk for which no premium was charged. Many cases following this rule are cited in 1 ALR3d at page 1147. The following is a quote from 1 ALR3d 1144:

> "While waiver and estoppel have been held applicable to nearly every area in which an insurer may deny liability, the courts of most jurisdictions agree that these concepts are not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or expressly excluded therefrom. . . ."

A corollary to this rule is that estoppel or waiver are available to an insured to prevent a forfeiture of all his rights under a policy of insurance. The rationale for this rule is that an insurer will not be permitted to issue a policy while knowing facts about the insured or the risk that would render the policy void or worthless. The question raised by the instant matter is, then: does the reliance by the appellant on the exclusion clause of its policy result in a forfeiture of all appellee's rights under the policy so that waiver or estoppel is available to appellee or does such reliance merely prevent the appellee from recovering on a risk that is specifically excluded from the policy?

The two cases cited by the appellee in support of its estoppel theory and the one case cited by the Court in its opinion are forfeiture cases where estoppel was found to exist in order to prevent a complete forfeiture of the insured's rights. They do not, therefore, apply to the facts of the instant case. In *Great Northern Life Ins. Co. v. Cole*, 207 Okla. 171, 248 P.2d 608 (1952), the policy excluded from coverage anyone who was employed as, among other things, an "automobile machinist." When the policy was issued, the insurer knew that the insured was so employed and he continued to be so employed until his death. To have given effect to this exclusion would have allowed the insurer to charge premiums for a worthless policy. In *Schwindermann v. Greater Eastern Casualty Co.*, 38 N.D. 584, 165 N.W. 982 (1917), the insured was employed as a boilermaker for a railroad. The insurer knew this. The policy excluded boilermakers from coverage. Since

the insured was a member of a class of persons totally excluded from coverage and since the insurer knew this when the policy was issued, the Court held that the exclusion relied upon had been waived by the insurer.

In its opinion, this Court has cited *Golden Gate Motor Transport Co. v. Great American Indemnity Co.*, 6 C.2d 439, 58 P.2d 374 (1936). Here again, the effect of allowing the insurer to rely on the policy provision it cited would be to totally deprive the insured of any protection under its policy. Estoppel was used to prevent a forfeiture.

It is respectfully urged that the instant case is not one where a reliance on the aviation exlcusion clause in appellant's policy would render the policy sued upon void. As has been pointed out in appellant's briefs filed herein, the appellee had substantial rights under the policy it received from appellant. Mr. Petris was covered for injury or death caused by an almost limitless number of incidents. There were a few clear restrictions on appellant's right to recover under the policy, but these certainly did not void the policy or make it worthless. Since no forfeiture of appellee's rights under the policy will result from an enforcement of the aviation exclusion clause, the doctrines of waiver or estoppel are not available to the appellee under the majority rule referred to above.

It is still felt that the case appellant has cited, *Hobbs v. Franklin Life Ins. Co.*, (5th Cir. 1958), 253 F.2d 591, is closer to the facts of the instant matter than any case cited by the appellee or the Court. There is no point in re-reviewing the *Hobbs* case here. It is enough to say that the insured in *Hobbs* was not excluded from all coverage because of his occupation as a pilot as in the cases cited by the appellee.

Appellee has made much of the fact that Mr. Petris was listed as an insured person on appellant's policy and the fact that appellant's agent supposedly said Mr. Petris was covered under the policy. As has been pointed out, Mr. Petris was covered, subject, of course, to the exclusions in the policy. No complaint about the policy was ever made by the appellant, although it had it in its

possession for over a year before Mr. Petris' accident, nor has there been any attempt by it to reform the policy. See *Birmingham Fire Ins. Co. of Pennsylvania v. Sharrow,* (S.D. Fla. 1965), 249 F. Supp. 429, where the Court made the following statement regarding representations as to coverage:

> "Such representation is not construed by the Court to constitute a misrepresentation inasmuch as Peter would be covered by the policy, subject to the exclusions therein, while driving an automobile not owned by his parents. Even if the agency had extended coverage of the policy by oral representation, such representation would not constitute waiver or estoppel. The doctrine of waiver and estoppel is not available to an insured when its effect would be to provide coverage where such coverage is expressly excepted or excluded from the terms of the policy." (Citing authorities.)

This Court has recognized the rule relied upon herein. See *Van Meter v. Franklin Fire Ins. Co.,* (9th Cir. 1947), 164 F.2d 325.

2. The Federal Court cases relied upon by appellee on the question of the construction of appellant's policy exclusion have been reversed. See *United Services Life Insurance Company v. Delaney,* (5th Cir. 1966), 358 F.2d 175; *St. Paul Mercury Insurance Company v. Price,* (5th Cir. 1966), 359 F.2d 74; and *Paul Revere Life Ins. Co. v. First National Bank in Dallas,* (5th Cir. 1966), 359 F.2d 641.

Respectfully submitted,

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Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated: October 14, 1966

JOHN S. HOBBS